NO. 82-168

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM 1982

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

TRANSPORTATION MANAGEMENT CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MOTION OF NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED GENERAL CONTRACTORS OF MASSACHUSETTS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE, AND BRIEF OF AMICI CURIAE, NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED GENERAL CONTRACTORS OF MASSACHUSETTS IN SUPPORT OF RESPONDENT.

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ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals for the First Circuit properly concluded that the burden to be placed on an employer in a proceeding pursuant to Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3), is that of producing credible evidence to rebut or neutralize the General Counsel's prima facie case, and not that of overcoming the prima facie case?

MOTION OF NEW ENGLAND LEGAL FOUNDATION AND ASSOCIATED GENERAL CONTRACTORS OF MASSACHUSETTS FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

Pursuant to Rule 36.1 of the Rules of the Supreme Court, the New England Legal Foundation and the Associated General Contractors of Massachusetts move this Court for leave to file their brief amici curiae, bound with this motion, in support of respondents.

New England Legal Foundation (NELF) is a non-profit, public interest law foundation, organized and existing under the laws of the Commonwealth of Massachusetts, for the purpose of engaging in litigation on matters affecting the economic interests of the people and businesses of New England. NELF has long been interested and involved in the statutory construction of, and the public policy issues surrounding, the National Labor Relations Act and the appropriate legal standards for determining a violation of the Act. The Foundation has consistently supported the proposition that a proper balance between the rights and interests of employers and employees is

essential to the operation of our free enterprise system.

Associated General Contractors of Massachusetts (AGC) represents the leading general contracting firms engaged in the construction industry in the Commonwealth of Massachusetts. AGC's membership of 236 Massachusetts firms performed approximately 75 percent of the construction work carried out in Massachusetts during 1982, representing a value in excess of $1 billion. The association includes both union and open-shop contractors, and its members are engaged in work for both the public and private sectors. AGC represents the interests of its general contractor members in important matters affecting those interests before the courts, legislative bodies, and state and federal regulatory agencies. Many employees of AGC member firms regularly engage in activity which is protected under the National Labor Relations Act, and AGC and its members are actively concerned with the

issues raised in the instant litigation.

Amici support the rights of employees to engage freely in protected activity, but also strongly endorse the rights of employers to determine the terms and conditions of employment. The success of businesses operating in the free enterprise system depends in large measure upon striking the appropriate balance between these often competing interests. Claims of unfair labor practices can, if unfounded, severely impair the ability of a private enterprise to manage its work force in the most efficient and effective manner.

Amici's public interest perspective, combined with its broad experience in matters which effect the economic vitality of New England, will provide this Court with a point of view which might not otherwise be presented in the instant case.

For the foregoing reasons, New England Legal Foundation and Associated General Contractors of Massachusetts pray that this Court

grant its motion for leave to file the accompanying brief amici curiae in support of the Respondent.

By their Attorneys,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 6

ARGUMENT

I. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE BURDEN OF PROOF IN A PROCEEDING BEFORE THE NLRB PURSUANT TO SECTION 8(a)(3) OF THE NATIONAL LABOR RELATIONS ACT REMAINS ON THE GENERAL COUNSEL AND DOES NOT SHIFT TO THE EMPLOYER 9

A. The General Counsel Bears a Statutorily Mandated Burden of Proof in Actions Pursuant to Section 8(a)(3) of the National Labor Relations Act .. 13

B. The Court of Appeals Correctly Applied the Standards Set Forth by This Court in Allocating the Burden of Proof on the General Counsel and a Burden of Production on the Employer 23

CONCLUSION 34

TABLE OF AUTHORITIES

Cases

Behring International, Inc. v. NLRB, 675 F. 2d 83 (3rd Cir. 1982), petition for cert. pending, No. 82-438 12,15

Ernst & Ernst v. Hochfielder, 425 U.S. 185 (1976) 17

Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322 (1977) 16

Martel Mills Corp. v. NLRB, 114 F. 2d 624 (4th Cir. 1940) 20

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1971) ..... passim

NLRB v. Barrett Co., 135 F. 2d 959 (7th Cir. 1943) 20

NLRB v. Entwistle Mfg. Co., 120 F. 2d 532 (4th Cir. 1941) 20

NLRB v. Fixtures Mfg. Corp., 669 F. 2d 547 (8th Cir. 1982) 22

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 10

NLRB v. Remington Rand, Inc., 94 F. 2d 862 (2nd Cir. 1938), cert. denied, 304 U.S. 576 20

NLRB v. Transportation Management Corporation, 674 F. 2d 130 (1st Cir. 1982) ..... 4,15, ... 22,23

NLRB v. Union Manufacturing Co., 124 F. 2d 332 (5th Cir. 1941) 20

NLRB v. Webb Ford, Inc., 689 F. 2d 733 (7th Cir., 1982) 12,15

Piper v. Chris-Craft Industries, 430 U.S. 1 (1977) 17

Railroad Comm. of State of Wisconsin v. Chicago, B & Q. R.C. Co, 257 U.S. 563 (1922) 16

Scripps-Howard Radio v. FCC, 316 U.S. 4 (1942) 17

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 8,12,26
..... 30,31

United States v. Blasius, 397 F. 2d 203 (2nd Cir., 1968), cert. dismissed, 393 U.S. 1008 (1969) 16

United States v. Oregon, 366 U.S. 643 (1961) 17

Wright-Line, a Division of Wright Line, Inc., 251 N.L.R.B. 1083, enforced, 662 F. 2d 899 (1st Cir. 1981), cert. denied, No. 81-987 (Mar. 1, 1982) ..... passim

Zurn Industries, Inc. v. NLRB, 680 F. 2d 683 (9th Cir., 1982) 20,21,22

Statutes, Regulations and Rules

Administrative Procedure Act, Section 7(c), 5 U.S.C. 556(d) 6,14,21

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e, et seq. 29

National Labor Relations Act, 29 U.S.C. 151, et seq.:
Section 8(a)(1), 29 U.S.C. 158(a)(1) .. 4
Section 8(a)(3), 29 U.S.C. 158(a)(3) .. passim
Section 10(c), 29 U.S.C. 160(c) 6,9
..... 13,21

29 C.F.R. 101.10(b) 14,21

Miscellaneous

Amendments to the National Labor Relations Act: Hearings on H.R. 8, H.R. 725, H.R. 880, H.R. 1095, and H.R. 1096 Before the House Comm. on Education and Labor, 80th Cong., 1st Sess. (1947) .. 18

93 Cong. Rec.: pp. 6518-6519 19,21

H.R. Rep. No. 510, 80th Cong., 1st Sess. (1947) 19,20

H.R. 3020, 80th Cong., 1st Sess. 39 (1947) 18

9 Wigmore on Evidence, §2487 (3rd Ed. 1940) 31

STATEMENT OF INTEREST OF AMICI CURIAE

New England Legal Foundation (NELF) is a non-profit, public interest law foundation, organized and existing under the laws of the Commonwealth of Massachusetts, for the purpose of engaging in litigation on matters affecting the economic interests of the people and businesses of New England. NELF has long been interested and involved in the statutory construction of, and the public policy issues surrounding, the National Labor Relations Act and the appropriate legal standards for determining a violation of the Act. The Foundation has consistently supported the proposition that a proper balance between the rights and interests of employers and employees is essential to the operation of our free enterprise system.

Associated General Contractors of Massachusetts (AGC) represents the leading general contracting firms engaged in the construction industry in the Commonwealth of Massachusetts. AGC's membership of 236 Massachusetts firms performed approximately 75

percent of the construction work carried out in Massachusetts during 1982, representing a value in excess of $1 billion. The association includes both union and open-shop contractors, and its members are engaged in work for both the public and private sectors. AGC represents the interests of its general contractor members in important matters affecting those interests before the courts, legislative bodies, and state and federal regulatory agencies. Many employees of AGC member firms regularly engage in activity which is protected under the Fair Labor Standards Act, and AGC and its members are actively concerned with the issues raised in the instant litigation.

The amici support the rights of employees to engage freely in protected activity, but also strongly endorse the rights of employers to determine the terms and conditions of employment. The success of businesses operating in the free enterprise system depends in large measure upon striking the appropriate balance

between these often competing interests. Claims of unfair labor practices can, if unfounded, severely impair the ability of a private enterprise to manage its work force in the most efficient and effective manner. The amici believe that the Congress, in its specific statutory reference to the allocation of the burden of proof in such cases, and the First Circuit Court of Appeals, in the interpretation of the statutory standard and the relevant case precedent, have struck the proper balance. The amici support the decision of the court below.

STATEMENT OF THE CASE

The National Labor Relations Board sought enforcement against the Transportation Management Corporation of an order based upon Board findings that the company violated Section 8(a)(1) and Section 8(a)(3) of the National Labor Relations Act. 29 U.S.C. §151, et seq. In an opinion reported at 674 F. 2d 130 (April 1, 1982), the United States Court of Appeals for the First Circuit, while acknowledging that several of the findings of violations of the Act were adequately supported by the record, declined to enforce the Board's order. The Court found that the Board had not based its conclusion of a violation upon the preponderance of the testimony taken. Rather, the Court concluded, the basis for the Board's finding was its determination that the company had failed to meet its burden of overcoming the General Counsel's prima facie case by establishing by competent evidence that the employee would have been discharged even absent his union activity.

Since the Court was of the opinion that the Board had imposed a burden of proof upon the Company which was outside its statutory authority, the Court remanded the case to the Board for reconsideration under the standard of NLRB v. Wright Line, 662 F. 2d 899 (1st Cir. 1981).

Following the entry of the judgment of the Court of Appeals on April 1, 1982, the NLRB filed a petition for a writ of certiorari. The petition was filed on July 30, 1982 and was granted on November 15, 1982.

SUMMARY OF ARGUMENT

The National Labor Relations Act is designed to strike a balance between an employee's right to engage in union activity and an employer's right to select its employees, to discipline them, and to discharge them. In order to maintain a balance between these competing rights, the Act requires that the General Counsel of the NLRB bear the burden of proof of a violation of the Act, and the employee bear the burden of producing credible evidence to justify the discharge of an employee.

A. Section 10(c) of the National Labor Relations Act imposes the burden of persuasion in an unfair labor practice case on the General Counsel. This provision is reinforced by the Board's own regulations and by Section 7(c) of the Administrative Procedures Act. While the National Labor Relations Board cites to certain legislative history as indicating that an employer bears a burden of proof in Section 8(a)(3) cases, there is no need to look to such legislative history

when the pertinent statutes are clear on their face. Furthermore, the cited legislative history is contradictory and, thus, is incapable of providing further clarification of a statute whose terms are already plainly self-evident.

B. While the Board's adoption of the Wright Line "but for" test in dual motive section 8(a)(3) cases is substantively correct, its reliance on Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), as grounds for placing a burden of proof on an employer is in error. Mt. Healthy is distinguishable from section 8(a)(3) cases on both statutory and factual grounds. In that action the employer admitted its violation of an employee's rights under 42 U.S.C. §1983, and raised an affirmative defense on which it appropriately bore the burden of proof. In the instant action, the employer is not raising an affirmative defense to the appropriateness of a remedy, but is instead denying the existence of any violation.

In reviewing the statutory mandate placed on the General Counsel by the National Labor Relations Act and other provisions of law, and the legal and factual discrepancies with Mt. Healthy, the Court of Appeals properly concluded that the procedure articulated in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) should be applied in section 8(a)(3) actions.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY CONCLUDED THAT THE BURDEN OF PROOF IN A PROCEEDING BEFORE THE NATIONAL LABOR RELATIONS BOARD PURSUANT TO SECTION 8(a)(3) OF THE NATIONAL LABOR RELATIONS ACT REMAINS ON THE GENERAL COUNSEL AND DOES NOT SHIFT TO THE EMPLOYER.

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3), provides that it is an unfair labor practice for an employer, by discrimination in regard to hire or tenure of employment, to encourage or discourage membership in any labor organization. Pursuant to §10(c) of the Act, 29 U.S.C. §160(c), the National Labor Relations Board may order remedial action, if upon the preponderance of the testimony taken, the Board is of the opinion that any person named in the complaint has engaged in such an unfair labor practice. The Board is, however, prohibited by this section from requiring the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of

any back pay, if such individual was suspended or discharged for cause.

While the Act is designed to prohibit unfair labor practices, it also purports to strike a balance between an employee's right to engage in union activity and an employer's right to select its employees, to discipline them, or to discharge them. Thus, the general premise of the Act was very clearly articulated. "An employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937). It has been aptly stated that sections 8(a)(3) and 10(c) impose a standard which is simple to state but often difficult to apply to practice. NLRB v. Wright Line, A Div. of Wright Line, Inc., 662 F. 2d

899 (1st Cir. 1981).

In practice, it is usual to have competing explanations of the grounds for which an employee is discharged. The General Counsel, representing the interests of the employee, will often produce some evidence supporting a conclusion that the discharge was motivated by anti-union animus, and the employer will produce evidence supporting a conclusion that the discharge was motivated by the employee's misconduct. When the persuasive character of the proof on either side of the issue is perfectly balanced — when there is equipoise — then the controversy presented by the Board's rule of law in the instant case arises.

The NLRB, purportedly in reliance on Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), argues that once the General Counsel has presented a prima facie case indicating an anti-union motivation for a discharge, the burden of proof shifts to the employer to overcome that prima facie case. That is, once the

prima facie case is established, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." Wright-Line, A Division of Wright Line, Inc., 251 N.L.R.B. 1083, 1089. The First and other Circuit Courts of Appeal, have properly determined that the appropriate statutes and regulations, and the holding of this Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), compel the conclusion that the employer need not carry the burden of proof, but need only produce sufficient credible evidence to rebut or neutralize the General Counsel's prima facie case. NLRB v. Wright Line, 662 F. 2d 899 (1st Cir. 1981); Behring International, Inc. v. NLRB, 675 F. 2d 83 (3rd Cir. 1982); NLRB v. Webb Ford, Inc., 689 F. 2d 733 (7th Cir. 1982).

A. The General Counsel Bears a Statutorily Mandated Burden of Proof in Actions Pursuant to Section 8(a)(3) of The National Labor Relations Act.

As with any other agency, the NLRB may act only in accordance with its statutory authority and must abide by any limitations placed on it by Congress. In the instant controversy the National Labor Relations Act itself imposes the burden of proving an unfair labor practice on the General Counsel. Section 10(c), 29 U.S.C. §160(c), states in part that:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order requiring such person to cease and desist from such unfair labor practices.

As interpreted by the Board's own regulations, this provision means that "[t]he Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act." 29 C.F.R.

§101.10(b) (1981). The Board itself has, acknowledged that the General Counsel bears the ultimate burden of establishing an unfair labor practice by a preponderance of the evidence. Wright Line, 251 N.L.R.B. 1083, n. 11.

Furthermore, even if the National Labor Relations Act, the Board's regulations, and the Board's own case precedent do not provide ample clarity in response to the question of the burden of proof in section 8(a)(3) cases, Congress has elsewhere supplied a general rule of practice in administrative actions of this sort. Section 7(c) of the Administrative Procedures Act states as follows: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d).

These statutes and regulations have been held to conclusively determine the issue in controversy by the First, Third and Seventh Circuits. As the First Circuit has stated, "Section 10(c), as well as the Board's own regulation, make clear that the

General Counsel must prove the employer's guilt by a preponderance of the evidence to warrant a finding that an unfair labor practice has occurred." NLRB v. Wright Line, 662 F. 2d at 904. "[T]he relevant statutes compel the result we reached." NLRB v. Transportation Management Corporation, 674 F. 2d 130, 133 (1st Cir. 1982) concurring opinion of Judge Breyer. Similarly, the Third Circuit has determined that, "[T]he Board is bound by statutory limitations which foreclose the issue. The Act itself imposes the burden of proving an unfair labor practice on the General Counsel." Behring International, Inc., v. NLRB, 675 F. 2d at 88. Likewise, the Seventh Circuit has agreed that shifting the burden of proof onto the employer runs "afoul of the Labor Act's strictures on burdens of proof as found at 29 U.S.C. §160(c)." NLRB v. Webb Ford, Inc., 689 F. 2d at 739.

The NLRB disputes the conclusion of these Courts, and seeks to justify its position by citing to various statements made during Congressional

hearings and debates on proposed amendments to the Wagner Act. Petitioner's brief at 17-21. But in working backward from the Congressional history to find that the plain meaning of a statute is in fact contradicted by implication, the Board ignores the well-advised admonition that "[T]he proper function of legislative history is to solve and not to create an ambiguity. Railroad Comm. of State of Wisconsin v. Chicago, B & Q.R.C. Co., 257 U.S. 563, 589 (1922); [other citations omitted]." United States v. Blasius, 397 F. 2d 203, 206 (2nd Cir. 1968), cert. dismissed, 393 U.S. 1008 (1969).

A basic canon of statutory construction is that when statutory language is clear on its face and fairly susceptible of but one construction, that construction shall be given to it. As this Court has observed in Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1977), "[L]ogic and precedent dictate that the starting point in every case involving construction of a statute is the

language itself." (citations omitted). It is both unnecessary and improper to allow an ambiguous and contradictory legislative history to override the plain meaning of the statutory language. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976); United States v. Oregon, 366 U.S. 643 (1961). It is, in any event, a step to be taken with considerable caution "against interpolating our notions of policy in the interstices of legislative provisions." Mr. Justice Frankfurter, in Scripps-Howard Radio v. FCC, 316 U.S. 4, 11 (1942), quoted in Piper v. Chris-Craft Industries, 430 U.S. 1, 26 (1977).

The accuracy of this admonition is well illustrated in the instant case. While faced with clear statutory language which imposes the burden of proof in a section 8(a)(3) action on the General Counsel, the Board relies on ambiguous and contradictory legislative history in an effort to justify its transfer of the burden of proof onto the employer. The legislative history relied on by the

Board resulted from a Congressional response to criticism that the NLRB was finding unfair labor practices "[e]ven when the Board admits that an employee was guilty of misconduct justifying discharge."[1] In response to this criticism the House of Representatives approved a bill which provided that:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, unless the weight of the evidence shows that such individual was not suspended or discharged for cause.

H.R. 3020, 80th Cong., 1st Sess. 39 (1947). Following objections by the Senate, a joint conference committee modified the House Bill by deleting the phrase "unless the weight of the evidence shows" and substituting "[i]f upon the

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[1]Amendments to National Labor Relations Act: Hearings on H.R. 8, H.R. 725, H.R. 880, H.R. 1095, and H.R. 1096. Before the House Comm. on Education and Labor, 80th Cong. 1st Sess. 2723 (1947) (Statement of Theodore R. Iserman).

preponderance of the testimony taken." However the conference bill which was ultimateely enacted, contained a prohibition against the Board requiring reinstatement of or back pay to an employee if such individual was suspended or discharged for cause. H.R. Rep. No. 510, 80th Cong., 1st Sess. 13 (1947). The Board points to comments made by Senator Taft in discussions of the conference bill as purportedly evincing a clear legislative intent to reaffirm what he alleged to be the Board's existing practice. According to Senator Taft, once the Board had shown an impermissible motive for a discharge, the employer was to bear the burden of proving that it would have taken the same action for lawful reasons. 93 Cong. Rec. 6494, 6518-19 (1947). However, the Ninth Circuit has pointed out, contrary to Senator Taft's comments, that the pre-1947 decisions of the Board had in fact <u>not</u> been consistent in placing any such burden of proof

on the employer.[2] Zurn Industries, Inc. v. NLRB, 680 F. 2d 683, 692, n. 15 (9th Cir., 1982).

The legislative history also indicates that Taft's interpretation of the impact of the bill was strongly disputed. In fact, the statement of the House managers that accompanied the conference bill explains that the Board could find a violation only upon a preponderance of the evidence and that an employee shown to be discharged for cause was not to be afforded a statutory remedy, whether or not he was also engaged in union activities. H.R. Rep. No. 510 at 55, 80th Cong., 1st Sess. (1947). The House managers' opinion of the effect of the amendments was shared by Senator Pepper, who disputed Senator Taft's comments and argued that

[2]See, NLRB v. Entwistle Manufacturing Co., 120 F. 2d 532, 536 (4th Cir., 1941), and NLRB v. Barrett Co., 135 F. 2d 959, 962 (7th Cir., 1943), which held that the Act placed the burden of proving a legitimate reason for a discharge on the employer, and NLRB v. Union Manufacturing Co., 124 F. 2d 332, 333 (5th Cir., 1941), and Martel Mills Corp. v. NLRB, 114 F. 2d 624, 632 (4th Cir., 1940), citing NLRB v. Remington Rand, Inc., 94 F. 2d 862, 872 (2nd Cir., 1938), which held that under the Act the employee bore the burden of proof.

the bill would impose a burden on the employee to prove that he was discharged for union activities, rather than to make the employer prove that the worker was discharged for cause. 93 Cong. Rec. 6494, 6518-19 (1947). Thus, contrary to the Board's assertion that the legislative history conclusively shows a Congressional intent to place a burden of proof on the employer, all the history shows is a divergence of opinion on the effect of the amendment.

Even the Ninth Circuit, which has adopted the Board's Wright Line test, has stated that the legislative history is not conclusive. Zurn Industries, 680 F. 2d at 693. Yet, in the face of the clear language of Section 10(c) of the National Labor Relations Act, the Board's regulation 101.10(b), and section 7(c) of the Administrative Procedures Act, that Circuit reasoned that there is "no need to fathom the Congressional intent; it is sufficient for our present purposes if the history does not foreclose a legislative purpose to place on

the employer the burden of proving the presence of a legitimate cause." Id. at 689. This reasoning grants to the NLRB discretion simply foreclosed to it by statute.

Similarly, the Eighth Circuit, without addressing the statutory mandates or the Congressional history, upheld the Wright Line test as articulated by the Board, holding that there is "a reasonable basis in law" for the Board's use of the test, and therefore that it may be applied. N.L.R.B. v. Fixtures Manufacturing Corp., 669 F. 2d 547 (8th Cir., 1982). In analyzing this decision, the First Circuit concluded that the Court had relied upon the belief that the overall burden of proof is a question on which a court should defer to agency views. NLRB v. Transportation Management Corp., 674 F. 2d at 133, (Judge Breyer, concurring opinion). This reasoning is erroneous, since "[w]hether the Board can impose such an overall burden on the employer is a pure question of law. It involves a major and important

section of the authorizing statute; it is not 'interstitial;' and the language of the statute as well as its legislative history seems clear." Id. As Judge Breyer has asked, "[H]ow in the face of this language, is it possible not to hold that the overall burden of proving a violation remains with the Board?" Id.

B. The Court of Appeals Correctly Applied the Standards Set Forth By This Court in Allocating the Burden of Proof Between the General Counsel and the Employer.

In formulating the Wright Line test the NLRB departed from its prior view that discipline motivated in part by discriminatory reasons was unlawful, even if it might otherwise be motivated by lawful reasons. See Wright Line, 251 NLRB at 1084. This departure was prompted by increasing criticism from various Circuits that the "in part" test ignored the legitimate business motive of the employer and placed "the union activist in an almost impregnable position once union animus has been established." NLRB v. Wright Line, 662 F. 2d

at 902. In addition, as the Board admitted, "[T]he conflict over which test to apply in dual motive cases has now spread throughout the circuit courts to the extent that a review of the tests currently applied by the Board, our Administrative Law Judges, and the various courts of appeals reveals a picture of confusion and inconsistency." Wright Line, 251 NLRB at 1085.

Following the decision by this Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), the Board announced that,

> We shall henceforth employ the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the

protected conduct. Wright Line, 251 NLRB at 1089.

This test has been referred to as the "dominant motive" or "but for" test, that is, would the discharge have occurred "but for" the protected union activity. As justification for the Wright Line test the Board cites the test's consistency with the standards set by this Court in Mt. Healthy. Initially the burden is placed upon an employee to show that his conduct was protected and that this conduct was a substantial or motivating factor in the employer's decision to discharge him. If the employee carries this burden, the employer must then show by a preponderance of the evidence that it would have reached the same decision on discharge even in the absence of the protected conduct. Mt. Healthy v. Doyle, 429 U.S. at 287.

In analyzing the the Board's Wright Line test, the First Circuit agreed that the "but for" test is the correct substantive standard for evaluating the propriety of a discharge, but disagreed with the Board's allocation of the burden of proof. Citing

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), as providing the proper procedural rules for section 8 actions, the Court concluded that on both statutory and factual grounds the standards set by Mt. Healthy are inapplicable to actions initiated under section 8(a)(3) of the National Labor Relations Act. N.L.R.B. v. Wright Line, 662 F. 2d at 905, 906.

The Mt. Healthy case is statutorily distinguishable from the case at hand. The plaintiff in Mt. Healthy filed an action pursuant to 42 U.S.C. §1983 alleging that the Defendant had violated his First and Fourteenth Amendment rights. Unlike the instant case, the plaintiff was not seeking relief from an administrative agency but rather directly from the Court. Consequently, statutorily mandated procedures, such as the Administrative Procedures Act and pertinent sections of the National Labor Relations Act, simply did not there apply. However, in the instant matter, these provisions must be applied, and

consequently the burden of proof of a violation must remain on the General Counsel. To ignore those statutes would impermissibly negate the clearly stated will of Congress.

Mt. Healthy is also factually distinguishable from the instant case, which is typical of those brought under section 8(a)(3) of the National Labor Relations Act. In Mt. Healthy, a School Board denied a teacher tenure based upon a communication made by the teacher to a local radio station, and upon certain disruptive and unprofessional conduct. The School Board conceded that one of the grounds for the discharge was the communication, which was later found to be protected under the First Amendment. Having admitted its impermissible motive in the discharge, the School Board then alleged that the teacher's other conduct justified the discharge notwithstanding the fact that the employer had violated the employee's constitutional rights. The arguments of the School Board, therefore,

constituted a true affirmative defense concerning the appropriateness of the remedy, rather than the existence of a violation. In the absence of any statutorily imposed allocation of the burden of proof with respect to affirmative defenses, this Court appropriately determined that the School Board had to bear the burden of proving its affirmative defense.

Mt. Healthy, while logical and consistent with the factual pattern on which it is premised, is inapposite in the instant case, and in cases typical of those brought under Section 8(a)(3). Here, the employer has denied that the discharge was motivated by an anti-union animus and has alleged that the discharge was prompted solely by the employee's misconduct. Unlike the School Board in Mt. Healthy, the employer has not conceded that it interfered with the employee's protected activity. The employer is not, therefore, raising a true affirmative defense as to the appropriateness of a remedy to rectify the violation of an employee's

rights but is, rather, contesting the fact that any such violation occurred. The Court of Appeals concluded that under this fact pattern the allocation of the burden of proof provided in this Court's decisions in cases alleging violations of Title VII of the Civil Rights Act of 1964, rather than the allocation provided under Mt. Healthy, most logically and consistently applies to Section 8(a)(3) actions.

This Court has conclusively established the allocation of the burdens in a Title VII case.

> "[T]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff...." The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason. The defendant need not persuade the Court that it was actually motivated by the proferred reasons. It is sufficient if the defendant's evidence raises a genuine issue

> of fact as to whether it discriminated against the plaintiff.

Texas Department of Community Affairs v. Burdine, 450 U.S. at 253, 254.

The reliance by the Court of Appeals on the standards set forth in Burdine is not only consistent with the statutory mandate that the General Counsel bears the burden of persuasion in a Section 8(a)(3) action, but is also faithful to the common rules of civil practice. According to the Board's Wright Line test, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision. Both the Court of Appeals and this Court have interpreted the phrase "prima facie case" in its traditional sense, that is, the establishment of a legally mandatory, rebuttable presumption. N.L.R.B. v. Wright Line, 662 F. 2d at 905; Texas Department of Community Affairs v. Burdine, 450 U.S. at 254. Accordingly, the burden on the defendant is merely to meet or

rebut the prima facie case. Thus, "[a] 'prima facie' case...need not be overcome by a preponderance of the evidence, or by evidence of a greater weight; but the evidence needs only be balanced, put in equipoise, by some evidence worthy of credence...." N.L.R.B. v. Wright Line, 662 F. 2d at 905, quoting 9 Wigmore on Evidence §2487, at 282 (3d ed. 1940).

In fact, absent the interpretative gloss placed on it by the agency, the Board's Wright Line test is in accordance with the traditional allocation of the burden of proof. According to the test, once the General Counsel makes a prima facie showing of discriminatory motive, the burden shifts to the defendant to "demonstrate that the same action would have taken place even in the absence of the protected conduct." Wright Line, 251 N.L.R.B. at 1089. Had the Board interpreted the word "demonstrate" to mean bearing only the burden of production, rather than the burden of proof its ruling would have provided no conflict with the

governing statutes and case law.

The Board argues that requiring the employer to bear only the burden of production, rather than proof, would "seriously chill the exercise of Section 7 rights by employees, by undermining the effectiveness of the statutory protection for exercise of those rights." Petitioner's brief at 37. Discrimination in employment because of race, religion, or nationality is often as subtle and as difficult to ferret out as that resulting from anti-union bias. Yet, when faced with an argument that placing the burden of proof on an employee in Title VII cases would chill the exercise of the employee's rights, this Court was unpersuaded that limiting an employer's evidentiary obligation to a burden of production would unduly hinder the plaintiff. Texas Department of Community Affairs, 450 U.S. at 258. As this Court noted, the employer's explanation of its legitimate reasons must be clear and reasonably specific. Furthermore, although the employer does not bear a formal burden of

persuasion, the employer retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation. Id. Since the same considerations are present where the alleged discrimination is based on union activity the Burdine procedures should be followed in those cases as well as in Title VII cases.

CONCLUSION

The Court of Appeals properly concluded that the burden to be placed on an employer in a proceeding pursuant to Section 8(a)(3) of the National Labor Relations Act is that of producing credible evidence to rebut or neutralize the General Counsel's prima facie case, and not that of overcoming the prima facie case.

NEW ENGLAND LEGAL FOUNDATION AND THE ASSOCIATED GENERAL CONTRACTORS OF MASSACHUSETTS,

By their Attorneys,

January 30, 1983

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